section 18 and as it does not record the sums amounting to $1,500 paid by way of repayment prior to 27th September, 1960, the clear effect of section 18 (if effect is to be given to it) is that the plaintiff's claim is unenforceable.

For this conclusion there is no need to look further for authority than the judgment of the Privy Council in the case of *Kasumu* v. *Baba-Egbe.*[1] In that case their Lordships were concerned with the effect of section 19 of the Nigerian Moneylenders Ordinance which is *in pari materia* with section 18 of our Ordinance. There Lord Radcliffe said (at p. 546) that the effect of that section was:—

"that a defaulting moneylender not only incurs a monetary penalty for his offence but also loses any right to take legal proceedings to recover the money he has lent. So far as legal rights of action go he losses his money."

Later he said that such requirements as those contained in the section "strike indifferently at all moneylender's loans" and went on (at p. 551):—

"When the governing statute enacts that no loan which fails to satisfy any of these requirements is to be enforceable it must be taken to mean what it says, that no court of law is to recognize the lender as having a right at law to get his money back. That is part of the penalty which the statute imposes. There is no room to reform the terms of the loan, since the statute is not concerned with the vice of its content but with the vice of the conditions under which it was made."

If we are to give effect to it the argument is conclusive. It is said, however, that we should not give effect to it for it has been raised before us for the first time.

A point which is not raised at the trial and which is raised for the first time in the Court of Appeal must always be most jealously scrutinised (*The "Tasmania"* [2]). The question of whether effect should be given to such a point is, however, one for discretion (see *Perkowski* v. *Wellington Corporation* [3]) and the principles on which that discretion may be exercised have been thus set out in the case of *Connecticut Fire Insurance Co.* v. *Kavanagh* [4] (*per* Lord Watson):—

"When a question of law is raised for the first time in a court of last resort, upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is not only competent but expedient, in the interests of justice, to entertain the plea. The expediency of adopting that course may be doubted, when the plea cannot be disposed of without deciding nice questions of fact, in considering which the court of ultimate review is placed in a much less advantageous position than the courts below. But their Lordships have no hesitation in holding that the course ought not, in any case, to be followed, unless the court is satisfied that the evidence upon which they are asked to decide establishes beyond doubt that the facts, if fully investigated, would have supported the new plea."

In the present case there can be no question of "deciding nice questions of fact". The plaintiff himself produced the book as that in which he kept his account of his transaction with the defendant. In the light of the whole of his evidence it is inconceivable that if his attention had been directed to the state of the book he would have offered any excuse such as mistake for failure to record payments which he strenuously asserted had never been made. And even if by some sort of tergiversation he had managed to produce some such excuse it would not have been believed and in any event it would have availed him nothing for the provisions of section 18 are mandatory.

In the circumstances I would with respect adopt the words of Lord Halsbury in the case of *Sutherland* v. *Thomson*:—[5]

"I do not in the least mean to say that it is an absolute objection against a good point, if it is a good point, to say that it has not been raised in the court below, because this House ought to make such an order as ought to have been made originally.

For the reasons I have stated I would dismiss the appeal and allow the defendant's cross-appeal. In view of the grounds on which I would allow the cross-appeal there may be some question of apportionment of costs and I would wish to hear counsel on the point.

Barakbah C.J. (Malaya) and **Tan Ah Tah F.J.** concurred.

Appeal dismissed;

defendant's cross-appeal allowed.

Solicitors: *Skrine & Co.; K. Chelvanayagam.*

KARUPPIAH v. KEHAR SINGH

[F.C. (Thomson L.P., Barakbah C.J. (Malaya) and Tan Ah Tah F.J.) March 3, 1965]

[K.L. — Federal Court Civil Appeal No. 36 of 1964]

Moneylending — Memorandum not stating terms of promissory note or collateral security — Plaintiff's copy of memorandum not authenticated — Whether memorandum and promissory note can be read together — Moneylenders Ordinance, 1951, s. 16 — Evidence Ordinance, 1950, s. 114(g).

The defendant Karuppiah borrowed from the plaintiff Kehar Singh who was a licensed moneylender a sum of $11,500. The defendant signed two documents; one was a promissory note signed by the defendant and countersigned by the plaintiff, and the amount lent was stated therein to be the sum of $11,500; the other document was a memorandum of the contract in which the amount lent was stated to be the sum of $11,500. The amount actually handed to the defendant was $11,464, the sum of $36 having been deducted for the purpose of paying stamp duty on the documents. The defendant by way of collateral security for the repayment of the loan, deposited with the plaintiff the title deeds relating to certain lands owned by the defendant. The memorandum did not contain all the terms of the contract, especially the term regarding the collateral security, but the promissory note and the memorandum were

executed at practically the same time in the office of a Justice of the Peace named Lee Eng Teh. The plaintiff countersigned a copy of the promissory note and also signed a copy of the memorandum. However, he omitted to authenticate the copy of the promissory note and the question arose at the trial whether he authenticated the copy of the memorandum. The copy of the promissory note was produced at the trial by counsel for the defendant while the plaintiff was being cross-examined. The plaintiff identified it as the copy which had been delivered to the defendant and had to admit that he had not signed the form of authentication. The memorandum contained an acknowledgment duly signed by the defendant that a copy of the memorandum authenticated by the plaintiff was delivered to and received by the defendant. Although counsel for the defendant produced the copy of the promissory note at the trial, he did not produce the copy of the memorandum in order to show that it had not been authenticated by the plaintiff. The defendant did not give evidence nor were any witnesses called on his behalf. It was contended for the defendant that the contract for the repayment of the loan was unenforceable for three reasons. First, because the sum actually handed to the defendant was $11,464 the sum of $36 having been deducted for the purpose of paying stamp duties, there was no true note or memorandum of the contract in existence; secondly, because the copy of the memorandum given to the defendant was not authenticated by the plaintiff; thirdly, because the memorandum did not contain all the terms of the contract especially the term regarding the collateral security.

Held: (1) as the defendant was liable to pay the stamp duties on the documents, it was, in the words of Greer L.J. in *B. S. Lyle Ltd.* v. *Chappell*,(1) "unnecessary that the parties should go through the idle form of passing the cheque (or money) backwards and forwards";

(2) in the circumstances of this case the trial judge was perfectly entitled to rely on the provisions of section 114(g) of the Evidence Ordinance, as he did, and to draw the inference that the copy of the memorandum which was delivered to the defendant was authenticated by the plaintiff;

(3) although the memorandum read by itself did not satisfy the requirements of section 16 of the Moneylenders Ordinance as it did not contain all the terms of the contract, especially the term regarding the collateral security, in the circumstances of this case, the memorandum and the promissory note, which referred to the collateral security, could be read together as they were executed at practically the same time. Once the memorandum and the promissory note are read together, the requirements of section 16 of the Moneylenders Ordinance are satisfied and the contract for repayment is enforceable.

Cases referred to:—

(1) *B. S. Lyle, Ltd.* v. *Chappell* [1932] 1 K.B. 691.

(2) *Reading Trust Ltd.* v. *Spero* [1930] 1 K.B. 492, at p. 507.

FEDERAL COURT.

R. Ponnudurai for the appellant.

K. Raja Nayagam for the respondent.

Cur. Adv. Vult.

Tan Ah Tah F.J.: This is an appeal by the defendant against a judgment of the High Court in Malaya whereby judgment was given for the plaintiff for the sum of $13,915 with interest.

The facts of the case, so far as they are relevant to this appeal, may be stated as follows. The defendant was desirous of obtaining a loan of $11,500 from the plaintiff, who was a licensed moneylender. The plaintiff and defendant entered into negotiations and it was arranged that the plaintiff would lend the defendant the sum of $11,500 and that the defendant would, by way of collateral security for the repayment of the loan, deposit with the plaintiff the title deeds relating to certain lands owned by the defendant. Subsequently, both the plaintiff and the defendant went to the office of a Justice of the Peace named Lee Eng Teh. Certain documents were signed in Mr. Lee Eng Teh's office. What these documents were and the manner in which they were signed will be dealt with at a later stage in this judgment. A sum of $36 was deducted from the amount of the loan for the purpose of paying stamp duties on the documents. The learned trial judge in effect found that the sum actually handed to the defendant was $11,464. No complaint is made regarding this finding of fact in this appeal.

One of the documents which was executed in Mr. Lee Eng Teh's office was a promissory note. This promissory note was signed by the defendant and countersigned by the plaintiff and the amount lent was stated therein to be the sum of $11,500.

Section 16(1) of the Moneylenders Ordinance, 1951 provides that no contract for the repayment by the borrower of money lent to him by a moneylender, and no security given by the borrower in respect of any such contract, shall be enforceable unless a note or memorandum in writing in the English language or Romanised Malay be signed by the parties to the contract, and unless a copy thereof authenticated by the lender be delivered to the borrower before the money is lent, and no such contract or security shall be enforceable if the note or memorandum was not so signed before the money was lent or before the security was given, as the case may be.

Another of the documents which was executed in Mr. Lee Eng Teh's office was what purported to be a memorandum of the contract. In this memorandum, too, the amount lent was stated to be the sum of $11,500.

It is contended by counsel for the defendant that as the sum actually handed to the defendant was $11,464, the sum of $36 having been deducted for the purpose of paying stamp duties, there is no true note or memorandum of the contract in existence and that therefore the contract for repayment is not enforceable. In my opinion, this contention must fail in view of the decision of the English Court of Appeal in *B. S. Lyle, Ltd.* v. *Chappell.*(1) The following is a passage from the judgment of Greer L.J. in that case (at page 704) :—

"If the money to be borrowed was intended to be used for the extinction of the debt agreed by the parties at £200, it seems to be unnecessary that the parties should go through the idle form of passing the cheque backwards and forwards."

It is true that in that case the money to be borrowed was intended to be used for the extinction of a debt. However, in my opinion, the same principle should be applied to the facts of this case where the defendant was liable to pay the stamp duties on the documents.

I have already referred to two documents which were executed in the office of Mr. Lee Eng Teh. For the sake of convenience I will refer to one of them as the promissory note and the other as the memorandum. In addition to these two documents, the plaintiff countersigned a copy of the promissory note and also signed a copy of the memorandum. However, he omitted to authenticate the copy of the promissory note and the question arose in the court below whether he authenticated the copy of the memorandum.

The copy of the promissory note was produced by counsel for the defendant in the court below while the plaintiff was being cross-examined. The plaintiff identified it as the copy which had been delivered to the defendant and had to admit that he had not signed the form of authentication.

It is to be observed that the memorandum contains an acknowledgment duly signed by the defendant that a copy of the memorandum authenticated by the plaintiff was delivered to and received by the defendant. It is highly significant that although counsel for the defendant produced the copy of the promissory note in the court below, he did not produce the copy of the memorandum in order to show that it had not been authenticated by the plaintiff. The defendant did not give evidence nor were any witnesses called on his behalf. In the circumstances of this case it seems to me that the learned judge was perfectly entitled to rely on the provisions of section 114(g) of the Evidence Ordinance, 1950, as he did, and to draw the inference that the copy of the memorandum which was delivered to the defendant was authenticated by the plaintiff.

It is clear that the memorandum, read by itself, does not satisfy the requirements of section 16 of the Moneylenders Ordinance, 1951 as it does not contain all the terms of the contract, especially the term regarding the collateral security. However, the evidence shows that both the promissory note and the memorandum were executed at practically the same time in Mr. Lee Eng Teh's office. In my opinion, in the circumstances of this case, the memorandum and the promissory note, which refers to the collateral security, can be read together. The following is a passage from the judgment of Greer L.J. in *Reading Trust Ltd.* v. *Spero* [2] at page 507:—

"Once the form of the promissory note is identified, it can, in my judgment, be treated as part of the memorandum of contract, and the memorandum can then be read as if it contained the words, 'on the security of a promissory note in the following form.'"

This passage was an *obiter dictum* in that particular case but I would respectfully adopt it and apply it to the facts of the present case. Once the memorandum and promissory note are read together, the requirements of section 16 of the Moneylenders Ordinance, 1951 are satisfied and the contract of repayment is enforceable.

For the reasons which I have stated, I would dismiss the appeal with costs.

Thomson L.P. and **Barakbah C.J. (Malaya)** concurred.

Appeal dismissed.

Solicitors: *Rajendra & Teik Ee; K. Raja Nayagam.*

THE FREIGHTER "KIEN KUNG"

[O.C.J. (Buttrose J.) March 8, 1965]

[Singapore — Consolidated Suits Nos. 963 and 964 of 1963 and Suit No. 660 of 1963]

Insurance — Marine insurance — Missing ship — Perils of sea or barratry — Onus of proof — Complicity in casting away of vessel — Marine Insurance Act, 1906, s. 58

Three separate actions were instituted to recover the insured sums for cargo lost on the freighter "Kien Kung" which vanished while on a voyage from Singapore to Penang. Suits Nos. 963 and 964 of 1963 were consolidated. In suit No. 660 of 1963 it was agreed by the parties that the facts found by the court in Suit Nos. 963 and 964 would be acceptable in that suit, subject to the defendants' right to cross-examine the suppliers from whom the plaintiff purchased the goods. The plaintiffs' case was that the ship together with the cargo was lost, having sunk with all the said cargo by perils of the sea or by barratry of the master and mariners two of the risks insured against. The plaintiffs did not call either the master or any members of the crew to give evidence as to what happened to the ship, although they had come ashore after the alleged sinking of the ship.

Held: (1) the plaintiffs had failed to discharge the onus of proof which lay on them of establishing that the ship together with her cargo were lost by a peril insured against;

(2) the circumstantial evidence in the case showed that the plaintiffs were privy to the casting away of the ship.

Cases referred to:—

(1) *Twemlow & Ors.* v. *Oswin* 170 E.R. 1090.

(2) *Cohen* v. *Hinckly* 170 E.R. 1078.

(3) *Koster* v. *Reed* 108 E.R. 359.

(4) *Samuel* v. *Dumas* [1924] A.C. 431.